

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF WEST VIRGINIA
3 Cynthia D. Pajak,
4 Plaintiff,
5 vs. CIVIL ACTION NO.
6 1:19-cv-160
7 Under Armour, Inc.,
8 Under Armour Retail, Inc.,
9 and Brian Boucher,
10 Defendants.

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12 Proceedings had in the motion hearing of the above-styled
13 action on July 21, 2021, before Honorable Michael J. Aloï,
14 Magistrate Judge, in Clarksburg, West Virginia, via Zoom video
15 conference.

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17 APPEARANCES:

18 On behalf of the Plaintiff:

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26 APPEARANCES CONTINUED ON NEXT PAGE

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1 On behalf of the Defendants Under Armour, Inc. and Under
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14 On behalf of Defendant Brian Boucher:

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20 ALSO PARTICIPATING: Nathan Fetty, Law Clerk to Honorable
21 Michael J. Aloï

1 Wednesday Afternoon Session,
2 July 21, 2021, 3:00 p.m.

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4 THE CLERK: This is the matter of Cynthia D. Pajak
5 versus Under Armour, Inc. et al., Case Number 1:19-CV-160.
6 This matter comes on for a hearing on motions of plaintiff and
7 defendant regarding discovery.

8 Will counsel please note their appearance for the
9 record.

10 MS. SMITH: Amy Smith and Larry Rector for the
11 plaintiff, Cynthia Pajak.

12 MS. HURNEY: Good afternoon. Grace Hurney and Justin
13 Harrison, Jackson Kelly, on behalf of the Under Armour
14 defendants.

15 MR. KAMINSKI: Good afternoon, Your Honor. This is
16 Scott Kaminski on behalf of defendant Brian Boucher.

17 THE COURT: Mr. Kaminski, I don't see you by video,
18 so you're just by phone; is that correct?

19 MR. KAMINSKI: I am, Your Honor. I expected to be
20 back in Charleston in time for this hearing, but I am not, and
21 out of respect for the Court, I did not have access to a jacket
22 and tie right now.

23 THE COURT: You are fine. I can hear you well.

24 Ms. Askew, you were going to introduce yourself.

25 MS. ASKEW: Yes, Your Honor. Good afternoon. Amy

1 Askeu on behalf of the Under Armour defendants.

2 THE COURT: Okay. Thank you, counsel.

3 So as a matter of logistics, I'm first going to
4 address a motion the -- the plaintiff's motion to compel full
5 and complete responses to discovery requests, and that has to
6 do with ECF Number 466. And as you know, just, I think,
7 yesterday or the day before, Judge Keeley also referred motions
8 to me that were actually filed by the parties before this one,
9 but she didn't refer them to me until yesterday, although
10 they've been fully briefed.

11 I intend to do my best to address everything, because
12 I've already had the benefit of your briefing. We're
13 getting -- I'm hearing myself again. It has stopped. No, it
14 hasn't.

15 Although it's not in order as the motions have been
16 filed, I know my law clerk talked with the parties and they're
17 prepared to address ECF Number 466 first because that was the
18 first one that was referred to us.

19 And so in regard to Under Armour, who's going to, at
20 least initially, be speaking to the motion to compel in
21 response, ECF Number 466?

22 MS. HURNEY: Good afternoon, Your Honor. Grace
23 Hurney. I will be addressing Number 466.

24 NATHAN FETTY: Your Honor, this is Nathan. Let me
25 jump in for a second, please. I think it may be helpful if

1 everybody who's not speaking could mute themselves. Let's
2 try -- so Grace, if you would stay -- if you're going to be
3 arguing, yeah, thank you, Larry or Amy. Let's have Amy and
4 Justin unmuted and see if that helps. And everybody else
5 muted.

6 THE COURT: Thank you, Mr. Fetty.

7 Well, I do have -- I do want to speak to the
8 plaintiff first in regard to ECF Number 466, so if everyone
9 other than Mr. Rector and Ms. Smith would mute themselves, and
10 then we'll continue.

11 So I have a few questions -- are you going to handle
12 it, Ms. Smith?

13 MS. SMITH: Yes, Your Honor.

14 THE COURT: So let me --

15 NATHAN FETTY: Judge, I'm sorry to interrupt. If
16 Mr. Kaminski, if he hasn't, could mute on his end with his
17 telephone connection, that would be helpful, too.

18 MR. KAMINSKI: I was muted and I will do it again.

19 NATHAN FETTY: Just want to make sure. Thank you.

20 THE COURT: So Ms. Smith, there is a motion to compel
21 in regard to documents re the theft of Boucher's laptop
22 computer in 2018. I have a note that you -- Under Armour has
23 supplemented their discovery and this is no longer in dispute.
24 Is that correct, or am I missing something?

25 MS. SMITH: Your Honor, with regard to that first

1 request made in Mr. Rector's letter of June 14th, it is correct
2 that the -- just on Monday of this week, we received a
3 supplementation that included some documentation that the
4 laptop had been -- I'm trying to find the document here, but
5 that the laptop had been stolen from an airport in Bogota,
6 Colombia, I believe. We received three pages Bates numbered
7 Under Armour 7175, 7176, 7177, and 7178, so four pages
8 regarding that.

9 There is a reference in here that Mr. Boucher or his
10 manager needs to submit a stolen report. We don't have the
11 stolen report, but we do have a few emails from Mr. Boucher
12 indicating that his laptop had been stolen from an airport in
13 Bogota, Colombia.

14 THE COURT: Let's stop on that one. I now want to
15 hear from Ms. Hurney. Do you know whether such a report
16 exists, the stolen report?

17 MS. HURNEY: I do not know, Your Honor, if that
18 exists.

19 I would like to make a quick point of clarification.
20 Those documents were formally supplemented recently, but they
21 were provided previously in an informal fashion, given the
22 testimony regarding Mr. Boucher's laptop.

23 THE COURT: Okay. That's fine. You broke up a
24 little in the beginning, so have you all looked for a formal
25 report like a stolen item report and it doesn't exist, or you

1 can't find it?

2 MS. HURNEY: Your Honor, I do not believe we have
3 looked for it. That can be something that we can do, Your
4 Honor.

5 THE COURT: Okay. Well, to the extent -- I know it
6 was mentioned in your documents. If it can be supplemented
7 with that report, again, I mean, from the Court's perspective,
8 you've, I think, probably documented it sufficiently to verify
9 that it was stolen and where it was stolen from, but it
10 references a report, so to the extent that can be found and
11 provided, I would direct you all to do so. And then we'll
12 go -- did you have anything else to say about that, Ms. Smith?

13 MS. SMITH: Not with regard to the laptop that
14 apparently was stolen from the airport in Bogota, Colombia.

15 THE COURT: Okay. Well, that's fine.

16 We're going to go next to reports created by Steven
17 Kitchen about audits of UA's legal hold room. Why don't you go
18 ahead and represent to the Court why you think that is relevant
19 and why you think it does not violate the attorney-client
20 privilege.

21 MS. SMITH: Absolutely, Your Honor.

22 With regard to Mr. Kitchen's audits of the legal hold
23 room, Mr. Kitchen testified at his deposition that the Boucher
24 laptop was in the legal hold room. He testified as follows,
25 Your Honor: That the laptop was in the legal hold room that he

1 maintains and audits every quarter for our legal team. And it
2 was one of those laptops in there. How it got in there, I
3 don't know.

4 And then he goes on and he says -- Mr. Rector asked
5 him: Okay, and you say you maintain and audit that room. What
6 does an audit entail for that room?

7 He answered, and this is on page 72 of his deposition
8 transcript: I'll get a list of teammates, things like that,
9 that are supposed to be in there that are not supposed to be in
10 there any longer, and I audit these -- these rooms and send my
11 findings back to Mike Maryanski and also the legal team.

12 So this is a question, so it's: Let me make sure I
13 understand that. It's an audit of those persons who have
14 access to the room?

15 Answer: No. It's just an audit of equipment that is
16 in that room.

17 And then he says, in response to a question: Are
18 there reports of these audits?

19 Mr. Kitchen responded: Recently, yes.

20 Mr. Rector asked: Were there in 2019?

21 He says he was not in that role in 2019.

22 And he says: You got into the role. Were you aware
23 that reports of that type had been created by Under Armour?

24 No. He testified that that was something that he
25 initiated.

1 The question: Is that something that you initiated
2 when you became part of that role?

3 And Mr. Kitchen said: Yes. So the process changed
4 when I came into this role. Instead of it going to security
5 and then going to me and then being held in a room, it would go
6 from the HR directly to me. It gets held in the legal hold
7 room and gets documented on a sheet.

8 THE COURT: So let me interrupt you now. Kitchen
9 testified that as far as he was aware, reports -- he didn't
10 start doing this and start creating reports until when?

11 MS. SMITH: He started creating reports in 2019, Your
12 Honor, or -- he took on the role in late 2019 and began in late
13 2019 or early 2000 -- I'm sorry. End of '20, beginning of '21.
14 I'm sorry, Your Honor.

15 THE COURT: I understand what he said, so tell me why
16 it's relevant and then why you think it does not violate
17 attorney-client.

18 MS. SMITH: Absolutely, Your Honor. He testified in
19 response to the question: So there would be some documentation
20 at the end of '20 or the first of 2021 that shows this Boucher
21 laptop being in that room?

22 Answer: Correct.

23 Question: And that hasn't been produced, has it?

24 Answer: I couldn't answer that question.

25 It hasn't been produced, Your Honor. And Mr. Kitchen

1 testified that he was the one who initiated this process. He
2 testified that he --

3 THE COURT: You don't need -- I'm sorry. Excuse me,
4 Ms. Smith. You don't need to read any more of his deposition.
5 In fact, if anyone recalls, I was present and listening to it.

6 So let me ask you something, Ms. Hurney. Do such
7 reports exist? Is there a way to produce such reports that
8 would redact everything other than whether Boucher shows up in
9 this room or not, according to Mr. Kitchen's report? Have you
10 seen one?

11 MS. HURNEY: Your Honor, if we were to redact the
12 report to only show any reference to Mr. Boucher, we would be
13 redacting the whole report, Your Honor. Mr. Boucher is not on
14 the list for this spreadsheet.

15 THE COURT: Okay. So Boucher does not show up on the
16 spreadsheet which basically Kitchen calls his report?

17 MS. HURNEY: Yes, Your Honor, that is correct.

18 THE COURT: And I was listening to his deposition.
19 What I understood that to meant was he has a spreadsheet that
20 says there's 20 laptops in the hold room and it may say who
21 they belong to. What you're representing to me, Ms. Hurney, on
22 the record, is that there are no reports or spreadsheet that
23 would show that his laptop was in the hold room?

24 MS. HURNEY: The report does not have Mr. Boucher
25 listed on the hold room, Your Honor. It does not. And we're

1 happy to submit that in camera, if you would like to examine
2 it.

3 THE COURT: Okay. That's fine. I'm going to direct
4 you to submit them in camera.

5 And I think that you can assume for purposes of the
6 record, Ms. Smith, that if the Court does not produce them,
7 then Mr. Boucher is not listed on those lists and in the hold
8 room, as represented by Ms. Hurney.

9 So if we do that, Ms. Smith, what else is there left
10 to do in regard to that request?

11 MS. SMITH: Your Honor, the request was not limited
12 to Mr. Boucher. It involves Ms. Pajak and her laptop, which
13 also should have been in the legal hold room, although
14 Mr. Kitchen testified with regard to her laptop that it was not
15 in the legal hold room, but it's plaintiff's position that
16 either the presence or absence of the laptops in the litigation
17 hold room is relevant evidence of spoliation the plaintiff is
18 entitled to. And so without regard as to whether the laptops
19 or a particular laptop is on a particular list at a particular
20 time, it's relevant to plaintiff's claims of spoliation. The
21 audit list --

22 THE COURT: I understand your argument. No. I
23 understand it.

24 Ms. Hurney, I assume when you send me that, I will
25 not see Boucher's name, or Pajak's, and if I do, I'll provide

1 it to the plaintiff. Is that correct?

2 MS. HURNEY: That is fair, Your Honor.

3 THE COURT: Okay.

4 So Ms. Smith, you will have this record as well as
5 the Court indicating that I've reviewed them in camera and
6 there is no reference either to Pajak or Boucher. You don't
7 need to know about anyone else. The other ones are not your
8 case. And if I tell you that they're not there, then you will
9 then have that evidence. So what else would you need in regard
10 to those reports?

11 MS. SMITH: Yes, Your Honor. That's sufficient.

12 THE COURT: Okay. I'm still getting --

13 NATHAN FETTY: Your Honor, I'm going to see what else
14 I can do.

15 THE COURT: I lost everyone, by the way.

16 NATHAN FETTY: Everybody's still here, Judge, on my
17 end.

18 THE COURT: I'm not seeing them. There we are.

19 So Ms. Hurney, you will produce those to me, and the
20 Court will review and then report whether Boucher or Pajak are
21 listed.

22 Now, let's go to item number three, talks about Webex
23 Teams chat logs, about efforts to locate Pajak's laptop. I
24 have a note that those documents -- or there has been a
25 response and they have been produced.

1 Is that correct, Ms. Smith?

2 MS. SMITH: Your Honor, they have -- the defendant
3 has produced three pages of Webex Team chat notes, Bates
4 Numbered 7368, 7369, and 7370, on Monday of this week. But
5 that is not sufficient to satisfy the request. This is a
6 situation where during Mr. Kitchen's deposition he referred to
7 the Webex Team chats in a particular context of a conversation
8 that he had with his boss regarding Ms. Pajak's laptop, I
9 believe, and he identified that it was not through email; it
10 was through a Webex Teams chat.

11 And Mr. Rector asked what the Webex Team chat feature
12 was. This is on page 98 and 99 of Mr. Kitchen's deposition,
13 and Mr. Rector indicated: Because we have nothing, not a
14 single chat in the case that's been prepared by Webex Teams.
15 And this is a whole other means of communication that
16 apparently has not been searched in responding to any discovery
17 requests.

18 So Mr. Rector asked later in the deposition,
19 beginning on page 151 and 152, what this Webex Teams chat
20 function was, and discovered that Webex Teams is a system that
21 Under Armour corporate has used for -- has used that system
22 being mid-2020, and that he uses it, Mr. Kitchen uses it, every
23 day; that most employees -- corporate employees of Under Armour
24 use Webex Teams chat because they kind of taught us to use that
25 system and to kind of stay away from email because things get

1 lost in inboxes. So for corporate teammates the majority of it
2 use Webex Teams or --

3 THE COURT: Ms. Smith, excuse me. I understand what
4 Webex is. We use it here in the federal court system. It's
5 IM. It's like internal text messages.

6 Ms. Knecht, I'm sorry about this. If the echo is
7 bothersome, please remind me and I'll repeat myself.

8 So I understand what it is. I don't even know if
9 it's capable of being preserved, but first of all, who is Mike
10 Maryanski, Ms. Smith? Who is Mike Maryanski?

11 MS. SMITH: I'm sorry, Your Honor. We're muting our
12 phone between speaking, so it takes me a minute. I apologize.

13 But Mr. Maryanski, Mr. Kitchen testified, is the
14 person who's an Under Armour employee who he reports to. So he
15 has a report on the Under Armour side and another one on his
16 HCL side. If you recall, Mr. Kitchen is embedded.

17 THE COURT: Okay. And, of course, you now have
18 Ms. Pajak's computer, which you all are going to do forensic
19 exam on on July 23rd, correct?

20 MS. SMITH: Your Honor, it is correct that
21 arrangements are being made to travel to Baltimore to view
22 Ms. Pajak's laptop, but that is not sufficient evidence with
23 regard to this spoliation claim. In the first instance, I
24 believe this is relating to the spoliation of Mr. Boucher's
25 laptop, but Ms. Pajak's laptop was not preserved through any

1 kind of legal hold. It was not produced or acknowledged that
2 it existed until after the close of discovery.

3 THE COURT: I'm familiar with that, Ms. Smith. I do
4 want to ask you some questions about that.

5 First of all, at least from my history with the case,
6 Ms. Pajak was concerned about her employment situation and was
7 communicating with counsel, Mr. Rector, well before her
8 discharge ever happened. And, in fact, the Court prohibited
9 Under Armour from having any access to those communications
10 between herself and Mr. Rector.

11 I just -- I can't imagine that Ms. Pajak wouldn't
12 have preserved everything on her own computer that would
13 support her claim, and this is her computer. She would have
14 preserved everything that she felt supported her claim and
15 would have shared it with her attorneys, because they were
16 involved over nine months before she was ever discharged. And
17 so I don't know what it is you expect to find that she wouldn't
18 have known about in advance. So can you help me with that?

19 NATHAN FETTY: Your Honor, before Ms. Smith responds,
20 let me just jump in here about this echo. It seems to be an
21 issue whenever the courtroom and the Steptoe connection are
22 both unmuted. So we really need Ms. Smith to be careful about
23 unmuting before it's time to speak. And in the meantime, Your
24 Honor, I'm trying to -- I'm frantically trying to find somebody
25 from IT to see if we can help things on this end.

1 THE COURT: And Ms. Smith, I'll be patient to give
2 you time to unmute, so go ahead.

3 MS. SMITH: Yes, Your Honor. Thank you. And I
4 apologize. We have been trying to stay mute when I'm not
5 speaking.

6 But in the Webex chat, to be clear, I may have
7 misspoke, the Webex chat, three pages that were produced do
8 relate to Ms. Pajak's laptop.

9 But Your Honor, the issue of Ms. Pajak having
10 information on her laptop is separate and apart from the issue
11 of whether Under Armour spoliated evidence in this case, and
12 Judge Keeley very clearly addressed that issue during the
13 hearing on March 4th. And Judge Keeley -- when Mr. Harrison
14 raised that issue that Ms. Pajak has information, Judge Keeley
15 said that doesn't give Under Armour a pass if they had notice,
16 and they've had notice since June of 2018 that Ms. Pajak has an
17 attorney and was likely to sue them, and they did not preserve
18 the evidence. That's spoliation on Under Armour's part
19 regardless of the fact that Ms. Pajak had her laptop.

20 Ms. Pajak dutifully gave her laptop back to Under
21 Armour when they instructed her to do so in December of 2018,
22 and despite litigation holds, that laptop, Ms. Hurney just told
23 the Court again, was not placed in a litigation hold room. It
24 was not preserved. That's been represented to the Court on
25 multiple occasions.

1 THE COURT: Ms. Smith, I'm simply raising my hand
2 so -- I would interject, but whenever we're together, we get
3 this echo, so if you can mute yourself now.

4 What I'm going to do on this -- y'all are going to
5 have a forensic examination on Friday of her laptop. You know
6 what was on there, what you preserved. I'm simply going to
7 hold a ruling on this motion in abeyance until your forensic
8 examination is done, and your forensic examination may show
9 nothing was deleted and everything is on there that Ms. Pajak
10 knows was on there. It may very well show that things were
11 deleted that were favorable to her case that she preserved.

12 But I just think it's a bit premature, until you see
13 what the forensic examination of her laptop reveals, and then
14 you have your expert to do so. I assume if there were things
15 that were favorable to you, you have them and your forensic
16 expert will be able to tell you whether or not there was any
17 efforts -- focused and particularized efforts by Under Armour
18 to remove those things. So I think it's premature at this
19 time. I will hold it in abeyance.

20 What I will do, Ms. Smith, if you can -- your
21 forensic expert gives you additional evidence in a report that
22 things that were, for lack of a better word, favorable to
23 Ms. Pajak and her discharge case were intentionally deleted by
24 UA, then I'll look at that report and I may not need to do
25 anything else, because that report may take care of what you

1 need. But I think I need to see what your forensic expert has
2 to say in that regard.

3 Now, as to -- go ahead and go on about the Webex
4 Teams chat log as to efforts to locate Pajak's laptop. I want
5 you to go ahead and finish up on that. I know you got some
6 information, and I want to hear what you have to say about
7 that, Ms. Hurney, so go ahead, Ms. Smith, if you have anything
8 else about the efforts to locate Pajak's laptop.

9 MS. SMITH: Your Honor, one point of clarification.
10 When you refer to what you term the forensic inspection on July
11 23rd, that's really nothing more than a physical view of the
12 laptop that's scheduled for -- and being scheduled for July
13 23rd. It's not a forensic examination of the laptop. I
14 believe that there's been a clone made of Ms. Pajak's laptop
15 and provided to our expert previously, pursuant to the Court's
16 order, and what's to happen on the 23rd is just a visual
17 inspection.

18 THE COURT: Well, I appreciate and I do recall the
19 reminder about the clone, but the substance is the same. If he
20 does a forensic examination of the clone and he has any
21 evidence that suggests that something's been intentionally
22 removed from there that you all can show to the Court is
23 relevant or favorable to her case, in your opinion, based upon
24 what you have, then I think you've already made your case in
25 regard to that particular situation. But I will permit you to

1 explore that once you have your forensic report. Do you have
2 the forensic report on the clone, Ms. Smith?

3 MS. SMITH: Sorry. Took a minute to unmute there.
4 We do not have the forensic report completed on the clone, Your
5 Honor, at this point.

6 THE COURT: So when you do, then I think this all
7 becomes far less speculative and you may have your questions
8 answered either in a way that's favorable to you or in a way
9 that's not favorable or that's neutral. But I just think that
10 it's better to see what your forensic reveals in that regard
11 and I can answer that.

12 Now, tell me about Webex. So some things were
13 provided to you. Why do you think what was provided is
14 inadequate?

15 MS. SMITH: Your Honor, the request was for all
16 responsive documents from Webex Teams to the discovery request.
17 What happened during Mr. Kitchen's deposition is we heard of a
18 whole different method of communicating that was not searched
19 throughout any of this responsive -- this discovery. And
20 that's jarring, Your Honor. It's a parallel universe that
21 Under Armour is operating under where they are encouraging
22 their employees to communicate not by email, but by Teams --
23 Webex Teams, and before that Cisco Jabber, and they're not
24 searching, apparently, because we have none of this information
25 until they provided the three pages.

1 THE COURT: Let me ask you this, Ms. Smith: If your
2 children want to get ahold of you quickly, do they text you or
3 do they send you an email?

4 MS. SMITH: It depends on the context, but if I had a
5 document request for communications with my children, I'd
6 search both.

7 THE COURT: Okay. Mine don't look at emails. They
8 look at texts. And I think we're in a time where people
9 just -- it's almost, rather than picking up the phone, they
10 just communicate by -- we have Webex at the court system, and
11 it's our instant messaging. It's how I communicate with my law
12 clerks. It's how they communicate with me quickly. And they
13 know that's a quicker way to get hold of me and talk than
14 sending an email.

15 So I don't -- I say it as a bit of a common practice,
16 but -- and it's a different kind of communication, because it's
17 a quick just kind of conversational communication, as I
18 understand it.

19 So Ms. Hurney, tell me, what have you all provided in
20 that regard, and is there anything else that would -- I wasn't
21 aware that it could be reproduced, quite honestly, but what
22 have you provided and is that everything that you have?

23 MS. HURNEY: Your Honor, the document that Ms. Smith
24 had been referencing, I don't have the Bates numbers on hand,
25 but the conversation that Mr. Kitchen testified to in his

1 deposition, the conversation between himself and Mr. Maryanski,
2 we have produced that conversation that was referenced in the
3 deposition, Your Honor. That is a nonprivileged communication
4 and that is, in fact, responsive to prior discovery requests
5 sent by plaintiff. As a result, we have produced it.

6 If I could make a few points, Your Honor.

7 THE COURT: Go ahead.

8 MS. HURNEY: Your Honor, Ms. Smith made this point:
9 Webex Teams, as Mr. Kitchen testified in his deposition, came
10 into being it sounds like in 2020, so after the litigation had
11 commenced. So Webex Teams chats wouldn't exist prior to 2020,
12 just because the company wasn't using it at that point, Your
13 Honor.

14 And to the reference to, I believe, Cisco Jabber, we
15 recently had the opportunity to depose Ms. Pajak, and when
16 asked the sorts of programs that she used in her job, she
17 didn't list any sort of additional communication programs or
18 software, which leads to my third point.

19 Mr. Kitchen had testified in his deposition that he
20 sees corporate employees use Webex Teams as a means for
21 communication. There is a distinction to be had between
22 corporate employees and retail employees, Your Honor. At UA
23 that means something. Retail folks are out in the field. They
24 work in the store. They're boots on the ground. Corporate are
25 those that are in the corporate location, Your Honor. That is

1 my understanding.

2 I do believe there's a distinction to be made between
3 Mr. Kitchen's testimony about corporate employees commonly
4 using this sort of messenger feature. It's probably convenient
5 for them when they're not on the road.

6 THE COURT: What did you provide to Ms. Smith?

7 MS. HURNEY: Your Honor, there is a series of
8 messages between Steven Kitchen and Mike Maryanski, who he
9 reports to on the Under Armour side, Your Honor, and that was
10 regarding the Pajak laptop, and I believe the communications
11 took place in May of 2021. That is what he testified to in his
12 deposition.

13 THE COURT: Okay. And that's where the efforts were
14 trying to locate Pajak's computer, right?

15 MS. HURNEY: Yes.

16 THE COURT: Okay. So back to you, Ms. Smith. I
17 mean, I think that's what you wanted, which is what's going on
18 between Maryanski and Kitchen as to trying to locate this
19 laptop, so what's insufficient?

20 MS. SMITH: Your Honor, I believe Ms. Hurney just
21 told you in a roundabout way that Under Armour has done nothing
22 whatsoever to review either Webex Teams chats or Cisco Jabber
23 for responsive information regarding Ms. Pajak's discovery
24 request, despite the fact that many of the people who are
25 involved here are, in fact, corporate, Mr. Toner, Mr. Boucher.

1 Many of the people involved in this litigation and who have the
2 responsibility to provide responsive documents are, in fact,
3 corporate. And regardless, there has been no effort whatsoever
4 to search these relevant chains of communication and to provide
5 responsive information.

6 The fact that they so readily had these three pages
7 and this looks like it just -- it begins on May 4th at 11:01
8 a.m., and it ends, three pages of it, on May 5th. It's one
9 day's worth that was provided to us between Mr. Kitchen and
10 Mr. Maryanski. Clearly they're using the Webex Teams chat, and
11 this needs to -- we were taken aback when we found that there
12 are whole other means of communications that were not searched
13 at all with the discovery responses here.

14 It's another indication it took them very little
15 time. Mr. Kitchen volunteered that responsive information was
16 on these -- on this method of communication that we don't use,
17 we didn't know anything about. But communications broadly
18 certainly were requested in the discovery request, and
19 certainly the Rules of Civil Procedure require that those means
20 of discovery are communications that must be searched.

21 THE COURT: It's an interesting -- I understand your
22 argument. I'm not convinced I accept it, but I have to think
23 about it. I can tell you, I mean, for example, when I want to
24 communicate with my law clerk, I don't pick up my phone. I
25 don't dial his extension and wait for it to ring and he answers

1 it. It's a quick, I need this, and he responds, and it's the
2 quickest way of communication.

3 And so it's certainly not the formality of an email
4 or other things, and so I don't -- I'm not reading into it what
5 you are. And plus, it's a relatively new means of
6 communication that they've been using, and sort of text. And I
7 don't want to call it text, but it's just sort of very internal
8 communication.

9 But I think -- let me understand from Ms. Hurney, I
10 mean, as far as you know, are there any other communications
11 between Maryanski and Kitchen about trying to locate Pajak's --
12 or is this what happened in trying to locate Pajak's laptop,
13 what you've shared with them and what you've provided?

14 MS. HURNEY: This is all we're aware of between
15 Mr. Kitchen, Mr. Maryanski regarding the location and the
16 efforts to locate the Pajak laptop, Your Honor.

17 THE COURT: Okay. I don't know what else to say,
18 Ms. Smith, other than they have now given to you what are the
19 communications.

20 MS. SMITH: May I, Your Honor? The first
21 communication is, I have Pajak's laptop. So that's the
22 beginning of it. Not efforts to locate it. That's the
23 beginning. That's the first one, 5-4-2021, at 11:01. I have
24 Pajak's laptop.

25 THE COURT: And that's what Kitchen is saying, or

1 Maryanski?

2 MS. SMITH: I'm sorry, Your Honor. That was
3 Mr. Kitchen to Mr. Maryanski, it appears. So we need to know
4 what came before that. That's clearly not the beginning.

5 THE COURT: Hold it there.

6 Now, Ms. Hurney, what about that? I mean, do you
7 have anything before the 5-4-2021 communication? It does sound
8 odd we would just start out, I have it. Was a request made to
9 look for it, and when?

10 MS. HURNEY: Your Honor, those are the only chats
11 we're aware of that discuss the Pajak laptop. What I would
12 assume, Your Honor, is that there were communications by email
13 that have either already been produced in this case because
14 they are nonprivileged and, in fact, responsive to the prior
15 request by plaintiff, or they are privileged communications
16 that are including UA's in-house legal counsel or external
17 counsel regarding the laptop, but we have produced this part of
18 the chat -- this is the only chat we're aware of that has to do
19 with Ms. Pajak's laptop.

20 THE COURT: Okay. I understand the argument. And I
21 understand yours, Ms. Smith. I have looked at the emails in
22 camera that had to do with legal assistants and people in the
23 legal department attempting to locate these laptops, and the
24 only thing in there, as I've represented before in writing in
25 my order, was simply mere logistical attempts to locate the

1 laptops, nothing else, just back and forth about trying to
2 locate them and that's it, nothing to suggest any argument that
3 would support hiding anything or any spoliation claims, at
4 least what was produced to me in camera, which I understand was
5 the emails, and I've ruled on that.

6 So let's -- in addition, you've had the opportunity
7 to depose Kitchen at length. I sat in on most of it. And
8 after hearing that, there are a number of things. Kitchen is
9 just kind of the keeper of these things. He gets involved.
10 They finally find her laptop and -- at a late date, and you all
11 now have it and you've had the opportunity to look at it, but I
12 just -- I haven't seen anything that would suggest, other than
13 people trying to find these things, and I get the argument that
14 why didn't it happen quickly, where was it. And I understand
15 that. But I don't know what else to say with it.

16 I understand your argument that you want them to
17 produce what Webex text Teams chats they have. I'll take that
18 under advisement.

19 Let me ask Ms. Hurney one question. In terms of just
20 proportionality and reasonableness, are these things easily --
21 I know it's a relative term. Are they easily produced and
22 stored, or what's your understanding?

23 MS. HURNEY: I'm not sure, Your Honor.

24 THE COURT: Okay. Who would know that?

25 MS. HURNEY: Mr. Maryanski would know, Your Honor.

1 We can inquire.

2 THE COURT: He's the tech guy; is that correct,
3 Ms. Hurney? Is Mr. Maryanski a tech guy who's Mr. Kitchen's
4 supervisor?

5 MS. HURNEY: Yes, Your Honor.

6 THE COURT: Okay. I think I've heard what I needed
7 to on that issue, and I'll make my ruling.

8 Let's go on to number four, Ms. Smith, list of all
9 devices, IDed by serial number or similar identifier, used by
10 Boucher. So why don't you go ahead and tell me your argument
11 in that regard.

12 MS. SMITH: Yes, Your Honor. This issue came up in
13 the testimony of Mr. Kitchen when he indicated -- actually, it
14 came up in the context of learning for the first time during
15 this deposition of Mr. Kitchen that, in fact, Mr. Boucher had a
16 whole other laptop for most of the relevant time period here.
17 That was, again, quite shocking.

18 But Mr. Kitchen testified that Mr. Boucher had a
19 laptop through the -- I believe it was November of 2018 that
20 was stolen from an airport in Bogota, Colombia. Despite all of
21 the hearings on these issues beginning back in January of 2020
22 regarding Ms. Pajak's motion to inspect Mr. Boucher's devices,
23 it's never been explained to the Court that Mr. Boucher had a
24 laptop for most of the relevant time period and it was stolen,
25 a few weeks before Ms. Pajak was terminated, from an airport in

1 Bogota, Colombia.

2 And so in the context of telling Mr. Rector how
3 Mr. Kitchen locates devices or can tell what devices have been
4 issued to someone, Mr. Kitchen testified that there is
5 something called Absolute, and that Absolute could find all of
6 someone's devices. He testified on page 170 to 172 with regard
7 to the context and how he found Mr. Boucher's devices, what had
8 been issued to Mr. Boucher on Absolute, and he testified on
9 pages 223 to 225 as to exactly what Absolute is and the fact
10 that Absolute can -- you can run reports off of Absolute which
11 give you lists of laptops issued to people, including Brian
12 Boucher, but not limited to him. You can just plug that in and
13 can do it by serial number. It can do it by Under Armour issue
14 number. It was the first thing that Mr. Boucher looked for to
15 find Ms. Cynthia Pajak's laptop in February of 2021.

16 THE COURT: Okay. Ms. Smith, let me interrupt you
17 now, because I want to speak to Ms. Hurney.

18 I mean, Ms. Hurney, can Under Armour produce simply
19 an inventory of maybe six items that was issued to --
20 electronic items that was issued to Mr. Boucher during his
21 employment? I mean, is it as simple as running it off of this
22 program, Absolute, print it off, and said when he started, he
23 had a laptop, an iPad, a phone, he lost an iPad, got another
24 one. I mean, seems to me that should be able to be done as to
25 what devices he had that were issued and then what he returned.

1 Can Under Armour do that?

2 MS. HURNEY: Your Honor, the program that's being
3 referenced, the software that plaintiff has brought up called
4 Absolute, that's a software program installed only on laptops,
5 PCs, and Macs. Other devices used by Mr. Boucher wouldn't be
6 picked up by Absolute, so as a result, we couldn't use that for
7 all devices that Mr. Boucher had.

8 THE COURT: Are you able to, in a -- just simply an
9 interrogatory response or say on the record what devices were
10 issued to him, or is Under Armour unable to say what devices
11 were issued to their employees?

12 MS. HURNEY: We could respond to an interrogatory
13 regarding Mr. Boucher's devices, Your Honor, yes.

14 THE COURT: Well, I don't know -- I'm trying to
15 see -- yes, I'm directing you then to respond to the
16 interrogatory, which is what devices were listed to him, and
17 identify them with as much particularity as you can.

18 So does that answer that question, Ms. Smith?

19 MS. SMITH: Yes, Your Honor, if they provide that
20 information.

21 THE COURT: Okay. Thank you.

22 Now, what about this chain-of-custody form? Has that
23 been taken care of?

24 MR. HARRISON: Your Honor, I apologize. I don't mean
25 to interject and prolong this, but in terms of responding to

1 that interrogatory, can we get a time period, please?

2 THE COURT: How much time would you need?

3 MR. HARRISON: I just mean the scope of --

4 Mr. Boucher was employed by Under Armour for several years.

5 How far back --

6 THE COURT: You mean not the time within which to
7 provide it. I just think we talk about the -- what devices he
8 had at the -- let me ask you, Ms. -- when did Mr. Boucher --
9 when was he first employed? Ms. Hurney, when was he first
10 employed with Under Armour?

11 MS. HURNEY: Your Honor, Mr. Kaminski could probably
12 correct me. I want to say it was around 2015, Your Honor, I
13 believe.

14 THE COURT: And so Ms. -- what do you consider the
15 relevant time period, Ms. Smith? I know when the lawsuit was
16 filed. I think we should have a reasonable time period before
17 it, but what time period are you suggesting or requesting,
18 Ms. Smith?

19 MS. SMITH: 2017, Your Honor.

20 THE COURT: Okay. Let's just make it January 1,
21 2017, to his discharge.

22 MR. HARRISON: Your Honor, if I might, all the
23 allegations in the amended complaint refer to actions and
24 activities that took place in 2018.

25 THE COURT: Ms. Smith, why wouldn't January 1, 2018,

1 be the appropriate date?

2 MS. SMITH: Your Honor, because he could have a
3 laptop that was issued in 2017 and 2018, or a phone or an iPad.

4 THE COURT: They are going to indicate, January 1,
5 2018, what laptop he had. Could have been issued to him in
6 2015. But I want to know the devices he had as of January 1,
7 2018. Is that helpful, Mr. Harrison?

8 MR. HARRISON: (Indicates thumbs up.)

9 THE COURT: How much time will you need to respond to
10 that, do you think, Ms. Hurney?

11 MS. HURNEY: A week would be sufficient, Your Honor.

12 THE COURT: Okay. I'll direct you to do so within a
13 week.

14 So let's go on to the chain of custody. Did you have
15 anything else to say about that, Ms. Smith?

16 MS. SMITH: No, Your Honor.

17 THE COURT: I'm sorry. Has that been provided?

18 MS. SMITH: Yes, it has.

19 THE COURT: Okay. Good. So that's number five.

20 Number six, I have a lease return spreadsheet. I
21 understand that that has been produced; is that correct,
22 Ms. Smith?

23 MS. SMITH: Your Honor, they produced several pages
24 that they purport to include a lease return list. I suppose
25 that's adequate. I'm not sure what it is yet. It's just a

1 list of numbers.

2 THE COURT: Well, that may be what a lease return
3 spreadsheet looks like, but I'll give you an opportunity, if
4 you think that's insufficient, to make an additional request,
5 but at this time Under Armour has represented it has been
6 produced, it's what they have, and so upon your review, if
7 there's something you believe otherwise, then that will be my
8 holding.

9 Now, number seven, there's documents, emails,
10 communications showing why Pajak's laptop was in the lease
11 return bin instead of on a legal hold. I don't want you to say
12 anything about that. I first want to hear from Under Armour.
13 I was listening to Mr. Kitchen's deposition in particular in
14 that regard when they found it in a lease return bin.

15 Ms. Hurney, are there any documents, communications,
16 emails, as to how it ended up in the bin?

17 MS. HURNEY: Your Honor, we have not located any
18 responsive documents or communications that are nonprivileged
19 that would answer that question.

20 THE COURT: And what -- I mean, are there
21 communications between lawyers or paralegals explaining how it
22 ended up in the lease bin?

23 MS. HURNEY: There is communications with counsel,
24 Your Honor, on the subject.

25 THE COURT: Okay. Well, I want you to produce those

1 to the Court in camera, please.

2 MS. HURNEY: Yes, Your Honor.

3 THE COURT: Okay. I'm going to review those,
4 Ms. Smith, and then I'll issue an order in that regard and go
5 from there.

6 The in camera deadlines that I've talked about,
7 Ms. Hurney, is a week going to be enough for you?

8 MS. HURNEY: Yes, Your Honor, that would be
9 sufficient. Thank you.

10 THE COURT: Okay. Thank you. So that will be the
11 28th.

12 Now, number eight, the updated privilege log,
13 Ms. Smith, showing when emails were sent to Kitchen regarding
14 locating Pajak's and Boucher's devices, indicates to me that UA
15 has supplemented this and it's no longer in dispute. Again,
16 that's what my summary indicates. Is that correct or is that
17 not correct, or is there something more to it, Ms. Smith?

18 MS. SMITH: Your Honor, we would request that any of
19 the documents that have been discussed today be added to that
20 privilege log as well. As far as we know, it's been
21 supplemented, but it's a continuing effort and it's important
22 that we have access to the privilege log.

23 THE COURT: My understanding is, Ms. Hurney, you have
24 provided the updated privilege log; is that correct?

25 MS. HURNEY: Yes, Your Honor. The communications

1 between Steven Kitchen and counsel, and whether in-house or
2 external, have been placed on the privilege log, yes.

3 THE COURT: And Ms. Smith already has those?

4 MS. HURNEY: (Nods head.)

5 THE COURT: Is that correct?

6 MS. HURNEY: I believe so, Your Honor.

7 THE COURT: Okay. So were you identifying something
8 else, Ms. Smith? I mean, it's represented that you have that.

9 MS. SMITH: Specifically, Your Honor, I was referring
10 to the documents that you were just discussing Ms. Hurney to
11 provide to the Court in camera. I don't believe -- to my
12 knowledge, those have not been placed on a privilege log, so
13 what I was referring to was the documents specifically we're
14 referring to today or any continued supplementation.

15 THE COURT: I know that we talked about Pajak's
16 laptop and why it was in the lease return bin instead of being
17 on legal hold, that perhaps some communications that you're
18 asserting, Ms. Hurney, are attorney-client privilege. To that
19 extent, I want to see those documents as well as a privilege
20 log supporting it. Does that make sense?

21 MS. HURNEY: Yes, Your Honor.

22 THE COURT: Okay. Is that what you were getting at,
23 Ms. Smith?

24 MS. SMITH: Yes, Your Honor.

25 THE COURT: Okay. So I see there's a number nine on

1 my list, which says all emails or other communications from
2 UA's legal team to Kitchen instructing him to locate Pajak's
3 and Boucher's devices. So tell me why you believe that that's
4 not attorney-client and I should order that be produced,
5 Ms. Smith.

6 MS. SMITH: Absolutely, Your Honor. Mr. Kitchen
7 testified that his relationship with Ms. Finck was such that
8 she was not giving him legal advice or instructing him legally;
9 that all of the communications that they had were simply, as
10 Your Honor said during the deposition and here today as well,
11 logistical. And those logistical communications are critical
12 to Ms. Pajak's time line and her understanding of what happened
13 with regard to the efforts to preserve evidence and the
14 spoliation of evidence, quite frankly.

15 But Mr. Kitchen testified during his deposition that
16 his relationship with Ms. Finck was not a legal one, that there
17 was no legal advice given, that it was simply logistical. And
18 Your Honor recognized that during the hearing and made some
19 rulings during the hearing that if the -- during the
20 deposition, that if the objections of Under Armour and
21 Mr. Walls are taken to the extreme, Ms. Pajak would be entitled
22 to nothing, and in fact, that's the nature of the objections.
23 There are objections at every turn to everything we asked for
24 and we believe that we're entitled to the documents that show
25 what the directions were. I think that that's consistent

1 with --

2 THE COURT: Here's what I'm going to rule on that.
3 Ms. Hurney, to the extent that there are any documents as -- or
4 emails between Mr. Kitchen and -- my recollection, I can't
5 think of the paralegal who he said he met with who said -- who
6 was basically giving him some directions as to what to look
7 for. He did it and she wrote it down and then he signed the
8 declaration.

9 So Ms. Hurney, if there's any other communications to
10 Kitchen that would advise him as to what he was to do in
11 looking for things on that device, I would direct you to submit
12 those to me in camera, and then I can determine whether they're
13 logistical, attorney-client.

14 And my understanding is that's pretty minimal; is
15 that correct, Ms. Hurney?

16 MS. HURNEY: I believe so. And I think the Court may
17 have already examined some of these emails when Mr. Walls
18 provided emails to the Court in camera.

19 THE COURT: And I may have. I mean, I -- I recall
20 looking at this type of emails, which were short, cryptic, and
21 really logistical about just finding things. But if that's --

22 Ms. Hurney, if they've already been produced, would
23 you simply produce them again in camera to just say, Judge,
24 these are the communications, and then I can take a look at
25 those and discern whether there's any violation of

1 attorney-client privilege or whether it's outside of the scope
2 of that. And then -- can you do that all within a week,
3 Ms. Hurney, on that list?

4 MS. HURNEY: Of course, Your Honor. Thank you.

5 THE COURT: Okay. Now, I think in regard to ECF
6 Number 466, Ms. Smith, that I've addressed everything; is that
7 correct? And if not, please let me know.

8 MS. SMITH: Your Honor, I believe that's it, Your
9 Honor.

10 THE COURT: Okay. Thank you.

11 So certainly, Ms. Hurney, if you can get those things
12 sooner, that's wonderful. I know you all have a hearing before
13 Judge Keeley on August 10th, and I certainly want to have my
14 rulings done in a time so that you have the benefit of those
15 and to express your disagreement with those before Judge
16 Keeley. Certainly she'll have the final say on it.

17 Okay. I now want to -- Mr. Fetty, as far as you're
18 concerned, are we okay on ECF 466?

19 NATHAN FETTY: Yes, sir, Your Honor.

20 THE COURT: Okay. Thank you.

21 Now, let's go to ECF 430. Looks like, Mr. Harrison,
22 you're stepping up, so you're going to handle that one?

23 MR. HARRISON: Yes, Your Honor, if you don't mind.

24 THE COURT: Now, this has to do with the 30(b)(6)
25 depo, and I see that United -- I'm sorry, Under Armour has

1 objected to certain topics identified, so with that, let's talk
2 about topic nine, Mr. Harrison. I'm going to try to give the
3 outline of what I think is appropriate under the 30(b)(6), and
4 I'll certainly give you the opportunity, Ms. Smith, to help me
5 consider whether I missed anything from your perspective.

6 So I understand, Mr. Harrison, that you consider it
7 too broad and also see where you've talked about there are some
8 things that you anticipate that your representative could talk
9 about, so do you want to explain that to me?

10 MR. HARRISON: Yes, Your Honor. And so what we're
11 coming up against in this case and the recent discovery
12 disputes is what type of evidence does plaintiff believe has
13 been spoliated in this case. In her amended complaint, she
14 identifies three categories of information that form the basis
15 of her spoliation theory.

16 And the Court may already be familiar with this, but
17 the three categories are My Game Plan, HR Analytics, and text
18 messages from Brian Boucher. Now, Under Armour certainly can
19 produce a witness to explain the existence or nonexistence of
20 information regarding My Game Plan, the existence or
21 nonexistence of information related to HR Analytics. No
22 objection to doing that. It's identified in the complaint. We
23 understand that's at issue.

24 As for why Mr. Boucher's texts are no longer
25 available, I don't think it makes sense to have Under Armour

1 produce a designee to testify about that. Mr. Boucher is the
2 one who testified he may have deleted the text messages towards
3 the end of his employment. If plaintiff wants to find out why
4 those text messages are no longer available, I think the
5 inquiry should go to Mr. Boucher, not to Under Armour through a
6 30(b)(6) witness.

7 And so those are the three categories that I wanted
8 to address. The problem I have with the original topic as
9 described by plaintiff, it's overly broad. And, I mean, let me
10 put it in context for you. We have tried very hard to have
11 plaintiff identify for us in discovery what evidence she
12 believes is missing. We had a phone call with opposing counsel
13 this morning pursuant to the Court's order, and we're at
14 loggerheads a little bit as to plaintiff's obligation to
15 disclose what evidence she believes is missing so that we can
16 wrap up discovery on this case. And this topic goes to that.

17 The only evidence identified in the complaint are
18 these three categories. We're prepared to go forward with a
19 30(b)(6) on two of the three. We don't think Under Armour
20 should have to produce a witness to explain why Mr. Boucher may
21 have deleted text messages near the end of his employment.

22 THE COURT: Sure. So, I mean, Ms. Smith, I want to
23 hear what you have to say, but I really don't know -- how do
24 you respond to a question that says all evidence about what
25 evidence no longer exists. I don't know how you answer that.

1 So I certainly am going to permit you to question their
2 representative about My Game Plan, about HR Analytics. It does
3 appear that all the allegations have to do with Boucher, who's
4 a defendant in this, and to that extent, at least, I understand
5 you've had a pretty exhaustive deposition of Boucher, but he's
6 a named party. It seems that that is the best way to handle
7 that.

8 So tell me if you have anything with particularity
9 other than My Game Plan and the HR -- I mean, that this
10 witness -- this witness can come prepared to answer. I mean,
11 to say all evidence, I think, Ms. Smith, is just too broad. So
12 go ahead.

13 MS. SMITH: Your Honor, thank you.

14 First, I want to be very clear, because this issue
15 of -- which is just a red herring, has come up time and time
16 again in these discovery disputes, and it just has to be
17 dispelled.

18 In the motion for leave to amend the complaint,
19 Ms. Pajak did not in any way, shape, form, or fashion, as
20 Governor Justice famously says, limit herself to the three
21 topics that Mr. Harrison just identified. And at the hearing
22 on March 4th, Ms. Williams made it clear that Ms. Pajak's
23 claims of spoliation go beyond those three categories that
24 Mr. Harrison has continually tried to pigeonhole her into.

25 THE COURT: Slow down, Ms. Smith. We really got to

1 back off the editorialization, counsel. The reason for this,
2 Ms. Smith, is that I don't want to have a witness there who's
3 going to say -- you're going to say all evidence and he's going
4 to say, this is only what I can speak to. And I don't know how
5 you get a Rule 30(b)(6) witness without some specificity to be
6 able for them to produce to answer your questions. So that's
7 the practical matter I have.

8 And so if you can identify some things with
9 particularity rather than saying all, then that will be helpful
10 to the Court. And that will give us some direction as to who I
11 will tell them to produce and how to answer those questions. I
12 mean, does that make sense, Ms. Smith?

13 MS. SMITH: Yes, Your Honor. We'll be happy to
14 provide a list.

15 THE COURT: Okay. Well, can you do it now and let's
16 talk about it, because I haven't found much agreement between
17 the parties.

18 MS. SMITH: Your Honor, there are a number of items
19 that have been spoliated.

20 THE COURT: Here's what I'm going to do on that,
21 Ms. Smith. I want you to email that list to the Court. Can
22 you get that to me before the end of business tomorrow? I want
23 you to copy Mr. Harrison. Then I'll give you an opportunity --
24 and send a list to Mr. Fetty. Copy Mr. Harrison. And I want
25 as much specificity as you can.

1 And then in that regard, Mr. Harrison, I understand
2 you're arguing about the three things listed. If there are
3 other things that are specific, I will want you to indicate to
4 the Court your objection, and then I'm just going to say in
5 that regard what your witness has to be able to testify to, to
6 the best of their knowledge. And if there is no evidence, then
7 your person can say that.

8 So are you able to do that by the end of the day
9 tomorrow, Ms. Smith?

10 MS. SMITH: Yes, Your Honor.

11 THE COURT: Okay. And then I'll give you till the
12 end of the following Monday. Would that work for you,
13 Mr. Harrison?

14 MR. HARRISON: (Indicates thumbs up.)

15 THE COURT: Which would be July 26th, the end of
16 business, to respond.

17 MR. HARRISON: Yes, Your Honor.

18 THE COURT: Okay. Thank you.

19 Now, I'm just going to go right to topic ten. I
20 mean, what -- I mean, it seems -- topic ten, it seems to me,
21 Ms. Smith, that -- what does Sarbanes-Oxley have to do with
22 this? And so if you're talking about recordkeeping, what is it
23 in particular that you're talking about? I mean, there's no
24 fraudulent accounting or reporting or financial things, so what
25 recordkeeping are you talking about and what kind of questions

1 do you want to ask in that regard? So tell me that.

2 MS. SMITH: Okay. Your Honor, under Sarbanes-Oxley,
3 publicly traded companies have to certify document controls,
4 and they have to have systems in place for document controls,
5 and Mr. Catzen, the defendant's expert, has testified with
6 regard to that. Well, Under Armour has represented to Judge
7 Keeley that they have no policies with regard to that, these
8 issues, when the issue came up previously in a hearing. And
9 these are relevant lines of inquiry because of the fact that
10 Under Armour's publicly traded and subject to Sarbanes-Oxley.

11 THE COURT: Mr. Harrison.

12 MR. HARRISON: Your Honor, just to correct the record
13 here today, Under Armour has record retention policies. What I
14 told the Court on March 4th is that Under Armour did not have a
15 written record of retention policy for HR records.

16 THE COURT: Okay.

17 MR. HARRISON: That's true today. That doesn't mean
18 we don't have protocols. That doesn't mean we don't have
19 processes. And if plaintiff wants to inquire about those
20 protocols or processes, or why there's not something in writing
21 in terms of personnel records or HR records, that's fine. I
22 don't understand the Sarbanes-Oxley piece. We're going to need
23 some more specification.

24 Plaintiff was employed in West Virginia. Are we --
25 if we're going to look at what state requirements for

1 preservation of HR records, are we going to look at West
2 Virginia, or are we going to look at Maryland, where Under
3 Armour is based? Are we talking about OSHA records? Are we
4 talking about payroll records?

5 I give you some context for this. I've been asked
6 repeatedly during my practice to provide record retention
7 schedules for employers. There are different time frames that
8 we recommend and suggest, depending upon the type of
9 information. And that basically goes to how long employers and
10 maybe other types of entities have to keep certain types of
11 records. These things are going to vary.

12 And this may be apples and oranges, but just to give
13 you an example in health care. In health care, employment
14 records might be maintained for two years. Payroll records
15 might be maintained for five years. The medical records are
16 going to be maintained maybe 18 or 20. And OSHA has a
17 different set of requirements.

18 So I think we're entitled to a little bit more
19 specification here from plaintiff, what type of state and
20 federal requirements is she referring to. Can she identify
21 them specifically so that we can properly prepare a witness.

22 But I will tell you this, and this issue isn't really
23 before the Court. We've given a preview of it. We deposed
24 plaintiff on June 22nd, and she was unable to identify any
25 information that was supposedly missing from My Game Plan,

1 which is the human resources information system. She was
2 unable to identify any information from that system that should
3 have been produced that hasn't been produced in this case.
4 And, in fact, she contradicted one of the key allegations in
5 her complaint, which is that Under Armour failed to produce
6 midyear performance evaluations for 2017 to 2018. She
7 testified that the process had changed and those were no longer
8 reduced to writing. And so this feels like an academic
9 exercise in the abstract. I just want to put that out there.

10 But if plaintiff can provide us with specification on
11 what she needs by whatever state or federal or regulatory
12 requirement she's referring to, we can tee off that.

13 THE COURT: So certainly I think it is, and I don't
14 think that Under Armour disputes that you can talk to them
15 about certainly they have someone there as to how they maintain
16 or what their protocols are and policy is in regard to human
17 resource records.

18 Are you looking at something broader than that,
19 Ms. Smith? And if so, in particular what, and then tell me
20 why.

21 MS. SMITH: Your Honor, we're looking for obviously
22 the records retention policies with regard to -- and their
23 compliance in particular. This is their compliance with state
24 and regulatory obligations. They know what state and
25 regulatory obligations --

1 THE COURT: Well, you shouldn't assume that. I mean,
2 god, there are lots of states and federal regulations. So, I
3 mean, you have to have someone there who can ask those. And, I
4 mean, it's a broad question just to tell me how do you comply
5 with all state and federal regulations. That's -- there's just
6 so many things.

7 So, I mean, this is an employment discrimination
8 case. I think the focus needs to be on what's relevant in an
9 employment discrimination case. And in particular that the
10 allegation is that she was discriminated against because, I
11 believe, her sex and age. So I just -- why would anything
12 outside of that be relevant?

13 MS. SMITH: Your Honor, to clarify, this is a
14 retaliation claim --

15 THE COURT: Well, okay.

16 MS. SMITH: -- by Ms. Pajak, but in answer to your
17 question, while human resources is certainly relevant here and
18 we would expect that type of information, it's been testified
19 to that -- or represented by Mr. Harrison that Under Armour has
20 no retention policy for anything other than emails. He
21 represented that to Judge Keeley very broadly.

22 And with regard to the nature of this case, their
23 retention policy with regard to all of these devices that we've
24 been talking about is also critical. The litigation hold, the
25 legal hold room, and all of the devices that we've been

1 discussing, laptops, iPads, phones, and their retention of
2 those and the information on them.

3 THE COURT: And I agree with that. And I think
4 that -- Mr. Harrison, I think we talked about it earlier. I
5 expect you all to have someone who can testify as to their
6 policy and procedures as to what do you do when you get a legal
7 hold. What are your policies and protocols. Are they written.
8 No. Then what are they and how do people understand them and
9 then they can list them. I think that's extremely relevant and
10 I'd certainly permit them to ask that, Mr. Harrison.

11 In regard to the keeping of employment files as it
12 has to do with someone's employment, I mean, not their medical
13 records or benefits or anything like that, I mean, this is an
14 employment claim, a retaliation claim, and but I understand it
15 to be a retaliation claim based upon how she felt they were
16 treating women; is that correct, Ms. Smith?

17 MS. SMITH: Yes, Your Honor.

18 THE COURT: Okay. So I can just tell you that if
19 you're going to ask a question about all state and federal law
20 and what your policy on records retention, I'm going to
21 overrule it, just saying that it's too broad. If you're going
22 to ask about what your HR -- well, what are your HR policies
23 and protocols in regard to when you get put on notice of a
24 potential litigation, they will answer that. What do you do
25 then with those devices. Where are they placed. How's that

1 kept track of. How are those -- how are those items preserved.
2 That's certainly appropriate. So you know what their policy
3 and protocol is.

4 And if the person answers, there's no written, this
5 is our policy and protocol, then that's their policy and
6 protocol. Whether that's a good idea or not, that's for
7 someone else to decide.

8 I just -- I don't see getting outside of that,
9 Ms. Smith, as being relevant, but maybe there's something else
10 that is particularly relevant that I'm missing. I mean, does
11 that sound fair in your line of questioning of them, and
12 Mr. Harrison will have someone who's able to answer that?

13 MS. SMITH: Yes, Your Honor.

14 THE COURT: Okay. And again, Mr. Harrison, in
15 particular because it is -- the additional discovery is
16 spoliation, it has to do with her employment, the records of
17 her employment, her performance, those things that have to do
18 with the meat of a retaliation claim based upon her being a
19 female, in essence, a sex discrimination claim also, and an
20 employment claim.

21 And then in particular because it seems to me in
22 following this, how are certain things preserved, policy and
23 procedures, and you'll have that person there who will be able
24 to produce, if there is written, you'll produce it; if there's
25 not, what their policy and protocols are.

1 Is that helpful, Mr. Harrison?

2 MR. HARRISON: Absolutely.

3 THE COURT: Okay. Let's go -- again, on topic
4 eleven, this whole what's their obligations and requirements
5 for record retention as a publicly traded company, my goodness,
6 if this was a shareholders' litigation suit, I might think
7 that's relevant, but did I cover earlier, I think, the areas
8 that you think you need to get into, Ms. Smith?

9 MS. SMITH: Your Honor, if they do have obligations
10 as a publicly traded company, we have a right to ask about
11 that. If they don't do anything to comply with those, then
12 they can answer that question. But we should be able to ask --
13 and the same thing back -- this relates back to Sarbanes-Oxley.
14 They have requirements under Sarbanes-Oxley. If they don't
15 want to testify to it, we have the right to ask them, I
16 believe, how do you comply with the statute.

17 THE COURT: This is where you're not answering my
18 question. How is Sarbanes-Oxley, how is record retention as a
19 publicly traded company, how is that relevant to your
20 particular case and the allegations in your case? They can
21 tell you what their policy and protocols are and what's in
22 writing. If you later determine that it's not in compliance
23 with Sarbanes-Oxley or publicly traded company and you think
24 that's relevant at trial and the trial court permits it in,
25 then that's their business, but this is an employment case and

1 it's a retaliation case, and so it's not bigger than that.

2 And so, I just -- I mean, I'm asking for help,
3 Ms. Smith, but if you all keep making it broader, then you've
4 made it real easy for me. I'm going to keep it narrow, because
5 I just see no reason Sarbanes-Oxley and publicly traded
6 company, again, if you want to make an argument to the Court
7 that, you know what, Your Honor, the fact that they don't have
8 a written policy in regard to retaining certain records is in
9 violation of federal and state law in regard to publicly traded
10 companies, you can make that argument. But this is about
11 facts, your client, and information that they have in regard to
12 her, and it's an employment retaliation case and that's the
13 focus of it.

14 I just can't see getting outside of that. And so if
15 you all start to do so, just -- I don't know how much more I
16 can say as to what I think is relevant context and to your
17 questioning.

18 So let's go on to number 12. Plaintiff seeks
19 testimony, all actions taken by Steven Kitchen in making his
20 sworn statement. I think, Ms. -- I know -- I don't know about
21 the timeliness. I know you've taken his deposition. Seemed to
22 be a thorough deposition. I don't know what anyone has to add
23 other than what he said in regard to his communications with
24 lawyers and others. I've taken that under advisement. I'm
25 going to review those documents, but is there anything else

1 about that topic 12 and Kitchen that you wanted to identify,
2 Ms. Smith?

3 MS. SMITH: That's sufficient, Your Honor.

4 THE COURT: Okay. Thank you.

5 It seems to me I've already ruled on topic 13 and the
6 declaration of Olson on these -- when I ruled about the
7 subpoena issues. Do you think I've -- did I resolve that? I'm
8 not saying in a way that anyone agrees with, but did I resolve
9 it? Do you believe so, Mr. Harrison?

10 MR. HARRISON: Your Honor, not exactly. So what you
11 did resolve were the subpoenas that were served upon JND,
12 Olson, and Ben Sexton, and those were document production
13 subpoenas. The order that you issued actually has a carve-out
14 as to to what extent there may be a dispute about Olson's
15 deposition. Plaintiff has requested Olson's deposition. If
16 plaintiff wants to depose Olson about the facts that support
17 her declaration, we have no objection to that, and we've been
18 consistent about that, I believe.

19 I've recently inquired of plaintiff's counsel what
20 other topics they want to ask her about, because that may butt
21 up against some of the rulings you've made, so I would like
22 to -- which hasn't been provided yet, but assuming Olson's
23 deposition goes forward and plaintiff inquires of her regarding
24 what efforts she made, her efforts described in the
25 declaration, I don't know why Under Armour has to provide a

1 30(b)(6) testimony to duplicate that.

2 THE COURT: Okay. So tell me, Ms. Smith, your
3 position on that. I think I did discuss that if -- that you
4 would have the opportunity to depose Olson, if you so desired,
5 again, about the logistics and the process as to how she came
6 about providing the declaration that she made. So what is it
7 you would want of a 30(b)(6) that would not be duplicative?

8 MS. SMITH: Well, to begin with, Your Honor, a
9 30(b)(6) deposition is different because it's testimony -- it's
10 broader in its testimony that binds the company. Questioning a
11 particular witness who was involved in something on an
12 individual level is different, frankly.

13 THE COURT: So what are you going to want to ask this
14 30(b)(6) about Olson?

15 MS. SMITH: Well, Your Honor, I believe that asking
16 about the context of the declaration, how it came to be that
17 Ms. Olson was asked to prepare the declaration, and all of the
18 context around it. One of the stumbling blocks that we've run
19 into, Your Honor, in many of these areas with regard to,
20 frankly, the Kitchen deposition -- or declaration, the Olson
21 declaration, is this issue of, just go ask Under Armour. Now
22 we're asking Under Armour, and it's, just go ask Ms. Olson.

23 But we have a right, frankly, Your Honor, to ask both
24 and to get the perspective of the person who did the
25 declaration and the context from the Under Armour

1 representative who's binding the company.

2 THE COURT: So Mr. Harrison, you're going to need to
3 have someone, a 30(b)(6), prepared to how was it that Olson
4 came about to be asked to prepare this declaration and what was
5 the expectations in that regard. It's not too big of a
6 question. And they should be able to handle it. That's my
7 ruling on that.

8 Topic 14, I don't know. Where are you going on topic
9 14 about something that Mr. Harrison said on the record,
10 Ms. Smith?

11 MS. SMITH: Yes, Your Honor. And that goes to the
12 information that's been provided to us all along with regard to
13 Mr. Boucher's devices and during hearings being represented to
14 the Court that Mr. Boucher did not rely on his laptop. I
15 believe that was a reference at the time to the laptop that was
16 spoliated and eventually produced for inspection in, I believe,
17 February, without any regard to the fact that, in fact, he did
18 rely on his laptop. It goes to the Kitchen deposition and
19 declaration.

20 THE COURT: I understand that, but I think that whole
21 statement was made when we were talking about the laptop, but
22 since then I've permitted you all to inspect the laptop.
23 You've had your own forensic evaluation about it. I don't know
24 how you ask a 30(b)(6) question to a company representative
25 about what Mr. Harrison represented to the Court. It just --

1 just not articulated that way. Mr. Boucher can ask whether he
2 relied on his laptop. And I'm sure you all thoroughly deposed
3 Mr. Boucher. But why is that a 30(b)(6) issue? I don't think
4 it is, so --

5 MS. SMITH: Your Honor --

6 THE COURT: Go ahead.

7 MS. SMITH: I'm sorry. If you asked a question, I'll
8 answer it. I wasn't unmuted.

9 THE COURT: I'm sorry. So you were unable to hear
10 me?

11 MS. SMITH: No. I heard you, Your Honor, ask the
12 question, I believe, of why that was a Rule 30(b)(6) issue.

13 THE COURT: So if you would answer, please.

14 MS. SMITH: Yes, Your Honor. It's a Rule 30(b)(6)
15 question, Your Honor, because it goes to litigation conduct,
16 and it goes to the issue of representations during litigation,
17 and litigation misconduct, frankly, and Under Armour's
18 involvement in litigation misconduct, making representations to
19 the Court during the course of litigation that clearly are
20 false at the time that they're made.

21 THE COURT: Okay. So give me an example of what you
22 would ask a 30(b)(6) witness in regard to what you're saying to
23 me right now.

24 MS. SMITH: Sure, Your Honor. And I would ask if
25 they were -- first, to start off, if they were aware that

1 Mr. Harrison had made that representation to the Court. And
2 I'd ask in follow-up what facts were known to them at the time
3 Mr. Harrison made that representation to the Court. And I'd
4 ask them what they had done to confirm or deny whether
5 Mr. Harrison, in fact, relied on his laptop.

6 THE COURT: Okay.

7 MS. SMITH: I'm sorry. Mr. Boucher relied on his
8 laptop, Your Honor.

9 THE COURT: I've heard enough.

10 You want to say anything about that, Mr. Harrison?

11 MR. HARRISON: No, Your Honor. I think we've talked
12 about this issue enough.

13 THE COURT: Yeah. That's not Rule 30(b)(6), and I'm
14 not going to permit it, and my order will indicate that.

15 Topic 15, plaintiff seeks testimony as to factual
16 basis for counsel Grace Hurney's statement. I'm not going to
17 permit you to talk about topic 15. Again, I don't know why
18 y'all are so tempted to continue to cross this line into what
19 is attorney-client information, and I just -- I don't
20 understand it.

21 Now, in regard to questions about the presentation of
22 the laptop once there is a litigation hold, how that is
23 documented, what their policy and procedure are, you can ask
24 all those things and you will have a corporate rep who will
25 answer them. And you are permitted to do that.

1 Now, let's go to topic 16, litigation hold as to
2 Pajak laptop, again, of a 30(b)(6). You can talk about the
3 process when there's a litigation hold, so if there is a
4 litigation hold, would it have affected Pajak's laptop. Yes.
5 Would it have affected Boucher's. Yes. And what's your policy
6 and procedure and what happened. And I'm sure, as we all know,
7 that Pajak's laptop wasn't in the litigation hold room. And
8 they can say when it was discovered and what their policy and
9 procedures are in that regard.

10 But you have it. You're going to have -- you have
11 the -- you're going to be able to do a forensic evaluation on
12 it, and certainly you have the right to ask about the process
13 as to how they handle devices once there's a litigation hold,
14 what's their policies and procedures, and that's very
15 appropriate, and whether they were followed in this case.
16 That's very appropriate.

17 And you'll have someone prepared to answer that,
18 correct, Mr. Harrison?

19 MR. HARRISON: Yes, Your Honor.

20 THE COURT: Okay. I will also -- in regard to topic
21 20, I'm going to permit you to ask the Under Armour
22 representative what, if any, policy they have once someone
23 leaves their employment as to the deletion of items on their
24 personal devices. And they can answer whether they have a
25 policy and procedure or whether, to the best of their

1 knowledge, Boucher followed that or did not.

2 Now, I understand in regard to topic 22,
3 Mr. Harrison, that you said you will provide a witness who will
4 answer why Boucher's iPhone was not inspected. As to whether
5 or not there's a duty to inspect, that's for someone else, but
6 certainly, Ms. Smith, you can ask the 30(b)(6), did Mr. Boucher
7 have a phone? Yes. Was it inspected at the time of the
8 litigation hold or at the time he left his employment. If
9 their answer is no, you can ask why. If the answer is yes, you
10 can ask, what are the results of that inspection. I think it's
11 for the Court, a jury, to conclude what that means, either
12 failure to inspect the iPhone, and for the Court to conclude
13 whether or not, if that iPhone was not inspected, has to do
14 with spoliation. It's a factual question. It's factual
15 evidence that I think you have a right to find out.

16 All the legal conclusions, Ms. Smith, are ones you
17 make after you have your facts, but I'm going to let you ask
18 about the phone.

19 You understand that, Mr. Harrison?

20 MR. HARRISON: Yes, Your Honor. And I don't have any
21 problem with how you've articulated or characterized the scope
22 of the inquiry. And I hate to be so nit-picky about the words
23 we're using here, but it's -- the way these 30(b)(6)
24 depositions go, if a witness is not prepared to testify about
25 one word that's in the topic, then accusations fly, so that's

1 why we challenged that topic.

2 THE COURT: No. I understand. And that's why I'm
3 doing my best to add clarity.

4 MR. HARRISON: Thank you.

5 THE COURT: So tell me about topic 27, Ms. Smith.
6 The plaintiff seeks testimony of a designee as to UA's failure
7 to retain investigative files. What are you referencing?

8 MS. SMITH: Your Honor, we're referring to HR files
9 in this case related to the complaints of a witness who has
10 been deposed with initials MD, and who had made complaints, and
11 we understand that the records were destroyed, so we need to
12 know about the investigative files, when the records were
13 destroyed, and who ordered their destruction.

14 THE COURT: So Mr. -- why don't you tell me your
15 position on that, Mr. Harrison.

16 MR. HARRISON: Yes, sir. So this requires a little
17 bit more explanation and review. I think Ms. Hurney touched on
18 this back in January of 2021. We were having some other
19 discovery disputes regarding this.

20 So to review, MD is a store manager for an Under
21 Armour retail location in Clarksburg, Maryland. In January of
22 2019, she relayed concerns about behavior she saw in the store.
23 Those concerns were eventually relayed to Ms. Pajak. Under
24 Armour does not dispute that MD relayed concerns. MD testified
25 that she could not recall whether she prepared a -- any kind of

1 statement or document relative to that incident. And so
2 there's nothing for Under Armour to produce, because we don't
3 believe anything existed in terms of documentation.

4 And we provided a little bit of explanation to that
5 to plaintiff earlier in this case. One of the HR
6 representatives who was involved with that situation signed a
7 declaration that explained her interactions with Ms. Pajak, so
8 we don't believe -- and we've looked, but we don't believe an
9 investigative file exists for the episode that's identified in
10 the amended complaint that MD testified about.

11 The problem here is this topic not only addresses
12 that incident; it goes beyond it. So MD testified in her
13 deposition that she experienced problems, was treated
14 inappropriately by other employees, by Under Armour, several
15 years ago, I think 2013, 2014, maybe.

16 During discovery, plaintiff has attempted to obtain
17 the investigative files related to those incidents. We have
18 been unable to locate or identify those files and, frankly, the
19 people who are involved with that are no longer at Under
20 Armour, so it's been sort of difficult to figure out why those
21 files no longer exist, assuming they did.

22 But my point is bigger than that. We're going really
23 far back in time and reaching really down -- we're going far
24 away in time and far away in scope in terms of plaintiff's
25 allegations. I don't know why Under Armour -- I don't think

1 it's relevant. I don't know why Under Armour has to produce a
2 witness to testify about the absence of investigative files
3 that are completely and wholly unrelated to plaintiff's
4 allegations.

5 Plaintiff wasn't involved in the incidents that MD
6 testified about in '13 or '14. Boucher was not involved. The
7 people who were involved are no longer at Under Armour. MD
8 testified that she left Under Armour and came back. So it's
9 not impacting MD's employment. It's not something that
10 plaintiff advocated about in 2018. It's not material to the
11 claims in the case. So that's my spiel.

12 THE COURT: But let me ask this, though. I mean,
13 does Under Armour have policy and protocol as to when a
14 complaint is made, an investigation is held, as to the
15 preservation of those files? And maybe their policy is once
16 they find no cause, they're destroyed. Whether that's a good
17 policy or not, I don't know, but I mean -- and the reason I'm
18 asking that is, you know, there's discovery about spoliation
19 and the issue becomes whether or not there's some --

20 MR. HARRISON: Nothing was spoliated here. Under
21 Armour isn't going to dispute -- doesn't challenge the fact
22 that MD raised concerns about these incidents.

23 THE COURT: Okay.

24 MR. HARRISON: So I think that kind of bears on this.
25 I don't know ultimately if they're going to be admissible at

1 trial, and I know we'll save that -- but Under Armour does not
2 dispute that MD had these concerns in '13, '14, in 2018. We've
3 made that clear to plaintiff for months.

4 THE COURT: And have they also made it clear that
5 there's no files to share in regard to those disputes, they're
6 gone?

7 MR. HARRISON: We have, Your Honor. We've looked
8 very hard. I cannot speak to the policies and protocols that
9 were in place and used by HR representatives in '13 and '14.
10 Things have changed since then.

11 THE COURT: And will your 30(b)(6) be able to say
12 exactly what you represented, we don't know what they were
13 then, today that's not the case, and we can't explain why they
14 no longer exist?

15 MR. HARRISON: Well, but we can't even explain
16 whether they actually existed, so it's sort of asking us to
17 follow up -- disprove a negative, in a way.

18 THE COURT: I understand. Did you want to say
19 anything else about that, Ms. Smith? I'm going to think about
20 it, but I want to hear what Ms. Smith has to say.

21 MS. SMITH: Your Honor, Ms. MD gave -- testified in
22 her deposition that she gave a statement, and Ms. MD left Under
23 Armour's -- Ms. Pajak was aware of Ms. MD and aware that Ms. MD
24 had given a statement regarding improper treatment to HR and
25 from an HR person, the bad behavior. This is evidence of prior

1 bad acts by Under Armour, even to the HR department.

2 Ms. MD made a statement. Ms. MD was employed by
3 Under Armour until December of 2019, at which point she
4 testified in part because of the behavior that she received
5 from Under Armour. And so, Your Honor, it's very relevant here
6 to Ms. Pajak's claims of spoliation of evidence that the
7 information with regard to this complaint have not been
8 produced.

9 THE COURT: Okay. I understand the argument. And I
10 do get that -- I understand perhaps -- is it your argument
11 number one Mr. Harrison, what does it have to do, any of those
12 arguments, with spoliation in Ms. Pajak's claim, correct?

13 MR. HARRISON: Correct.

14 THE COURT: And then I'm understanding your argument,
15 Ms. Smith, I think what it is that -- I think what you're
16 wanting to suggest is that when there are these types of
17 claims, the investigative materials turn up -- they're not
18 preserved and so they're -- that's -- and that was intentional,
19 and so that's just evidence of their conduct here; is that
20 correct?

21 MS. SMITH: Yes, Your Honor.

22 THE COURT: Okay. I understand the arguments.
23 Everyone, we kind of stuck these on at the end. I'm done for
24 today. I know we still have ECF 431 and 432 outstanding. What
25 I'm going to do is I don't mind imposing upon you all to stay

1 around so we can get some dates to reschedule, if I believe we
2 need them. Because a lot of this argument starts to overlap
3 and I think I understand things.

4 But at this point in time what I'm going to do is go
5 off the record, adjourn, and all I'm going to be discussing
6 with counsel are dates to schedule additional hearings, if
7 necessary, on the two remaining motions referred to the Court.

8 Mr. Harrison, did you want to say something before I
9 do so?

10 MR. HARRISON: Please. I apologize, Your Honor. By
11 agreement of counsel, the attorneys, the parties in this case,
12 have agreed to refer to certain individuals by initials. I
13 almost -- in referring to MD, I almost said out loud her full
14 name a few minutes ago. I would ask and make a motion to the
15 Court, if necessary, if the court reporter can modify the
16 transcript.

17 THE COURT: I will grant your motion and I will
18 direct that the court reporter -- and I did catch that for
19 Mr. Harrison. I know it was unintentional. The reference will
20 be MD and MD only. And to the extent that the court reporter
21 heard a name, I am directing the court reporter not to report
22 that in a transcript if it's -- or to report that at all.

23 Does that make sense, Ms. Knecht, and is that an
24 appropriate way to handle it for you? So I'll direct you to do
25 so.

1 Was there anything else you wanted to say,
2 Mr. Harrison?

3 Nothing further, we shall be adjourned. You all hang
4 on on Zoom and you'll talk.

5 (Proceedings adjourned at 5:01 p.m.)

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1 CERTIFICATE

2 I, Cindy L. Knecht, Registered Professional Reporter and
3 Official Reporter of the United States District Court for the
4 Northern District of West Virginia, do hereby certify that the
5 foregoing is a true and correct transcript of the proceedings
6 had in the above-styled action on July 21, 2021, as reported by
7 me in stenotypy.

8 I certify that the transcript fees and format comply with
9 those prescribed by the Court and the Judicial Conference of
10 the United States.

11 Given under my hand this 26th day of July 2021.

12 /s/Cindy L. Knecht

13 _____
14 Cindy L. Knecht, RMR/CRR
15 Official reporter, United States
16 District Court for the Northern
17 District of West Virginia
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